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No. 89-1298

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INGERSOLL-RAND COMPANY,
Petitioner,

v.

PERRY MCCLENDON,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Texas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the Chamber of Commerce of the United States of America ("the Chamber") hereby moves for leave to file the attached brief amicus curiae in support of the Petition for Writ of Certiorari. Petitioner Ingersoll-Rand Company has consented to the filing of the brief. Respondent Perry McClendon has denied consent.

1. The Chamber of Commerce of the United States of America is the largest federation of business companies

and associations in the world, representing nearly 180,000 members and serving as the principal voice of the American business community. Our members have expended billions of dollars on pension plans since Congress enacted the Employee Retirement Income Security Act of 1974 ("ERISA") and employ thousands of employees who stand to benefit from such plans. We have a strong interest in cases such as this, which represent a direct threat to the integrity of employee benefit plans across the nation.

2. Pursuant to Rule 37.1 of the Rules of the Court, the Chamber moves to file its brief amicus curiae to bring "relevant matter[s] to the attention of the Court that [have] not already been brought to its attention by the parties" that strongly support exercise of the Court's jurisdiction. Our brief highlights the following issues, in addition to the matters addressed in detail in the Petition.

3. First, our brief highlights the vital need to preserve ERISA's comprehensive and uniform regulation of pension plans from state interference. The decision below, recognizing a state wrongful discharge "public policy" tort for interference with pension benefits, directly conflicts with Congress' decisions to prohibit such discharges under ERISA and to confine litigation concerning such discharges to the federal courts. Congress made a careful and deliberate choice to limit the remedies available in ERISA, *see Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), and this choice serves to preclude additional state remedies, *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The legislative history of ERISA reveals that Congress struck a balance between protecting employee rights and keeping employer costs within reasonable limits, to avoid discouraging the creation of pension plans. Congress also vested exclusive jurisdiction over claims alleging interference with pension rights in the federal courts. This unusual choice of an exclusive federal forum insulates ERISA discharge claims from state interference to the maximum extent possible, by removing altogether the power of state courts to hear such claims. The Court should exercise its jurisdiction in this case to preserve Congress' deliberate decisions to limit ERISA-related liabilities and to preclude states from exercising jurisdiction over claims that Congress intended to be heard only in the federal courts.

4. Second, our brief argues that if states are allowed to recognize the public policy tort of wrongful discharge for interference with pension benefits, our members will be subject to significant state liabilities for compensatory and punitive damages that Congress did not include in ERISA's comprehensive enforcement scheme. Our brief highlights the particular danger posed by the "public policy" tort of wrongful discharge to ERISA's exclusive statutory and remedial scheme, by bringing to the Court's attention factual and legal materials not previously cited in connection with this case. As our brief establishes, thirty-nine states now recognize tort claims for wrongful discharge in violation of "public policy." Thousands of such claims have been filed across the country, resulting in six- and seven-figure awards for compensatory and punitive damages. The decision below therefore confronts employers who maintain federally controlled pension plans with the prospect of significant state-imposed liabilities that Congress did not envision when it enacted ERISA, and that employers could not have foreseen when they chose to institute their plans. Moreover, the concomitant growth in private pension plans since the passage of ERISA, also documented in our brief, creates a huge number of potential state court tort plaintiffs, who may well elect to litigate in state rather than federal court if presented with a choice between the limited equitable relief authorized by Congress and large compensatory and punitive damage awards available under state law.

5. Finally, our brief argues that the Court's immediate attention is necessary because a dangerous precedent for

avoiding federal preemption will be established if the decision below is left undisturbed. According to the reasoning of the Supreme Court of Texas, federal preemption does not apply because the tort claim it recognized provides for different, more expansive remedies than ERISA. This "supplemental remedies" theory for avoiding federal preemption conflicts with a line of decisions by the Court, exemplified by *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), and poses a dangerous threat to the integrity of numerous federal remedial schemes that Congress intended to be exclusive.

In order to bring these matters to the attention of the Court, the Chamber respectfully moves for leave to file the attached brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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March 14, 1990

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

INTEREST OF THE AMICUS CURIAE

1. The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 180,000 businesses and organizations and serves as the principal voice of the American business community.

2. The Chamber's members have a vital interest in preserving the uniform and exclusive federal regulation of penison plans intended by Congress when it passed the

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Our members have expended billions of dollars on pension plans governed by ERISA's intricate statutory scheme and employ thousands of individuals who stand to benefit from such plans. The threat to the interests of our members from the decision of the Supreme Court of Texas is national in scope. If states are allowed to recognize a "public policy" tort of wrongful discharge for interference with pension benefits, on the basis of a federal statute, the many thousands of employees across the country who are close to vesting in their pension rights and are terminated in the normal course of business will become potential state court tort plaintiffs. As a result, those of our members maintaining ERISA plans will find themselves subject to a significant liability that did not exist when they decided to begin such plans—awards of compensatory and punitive damages under state law.

3. Such liability directly conflicts with Congress' deliberate decisions, embodied in ERISA's express language, to prohibit the very conduct that Texas now finds contrary to its public policy, and to create an exclusive federal remedy for enforcing that federal prohibition. As part of ERISA's comprehensive federal regulation of virtually all aspects of employee benefit plans, Congress specifically prohibited the discharge of an employee for the purpose of interfering with the attainment of any benefit or right to which the employee may become entitled under a covered plan.[1] Congress further provided that claims under this section of the statute would be heard exclusively in the federal courts, and that such

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[1] Section 510 of ERISA, 29 U.S.C. § 1140, provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the [employee benefit] plan.

claims could be remedied only through the entry of injunctive or other appropriate equitable relief.[2]

4. This congressional decision to exclude state courts from ERISA enforcement is part and parcel of Congress' broader purpose of replacing haphazard state regulation with a uniform set of national rules, and thereby to encourage the formation and maintenance of ERISA plans. It was for this reason that Congress broadly preempted any and all state laws "insofar as they may now or hereafter relate to" any covered benefit plan.[3] As a result, those of our members deciding whether to create pension plans and those who deal on a daily basis with the intricacies of administering such plans have been guaranteed a defined, uniform, and exclusive set of applicable national rules.

5. The decision below compels the Court's attention because it poses an especially daunting threat of interference with the uniform legal framework established by ERISA. In the past decade, the proliferation of wrong-

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[2] Section 502(e) of ERISA, 29 U.S.C. § 1132(e), provides for exclusive federal jurisdiction over ERISA discharge claims as follows:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides for relief in ERISA discharge cases as follows:

> A civil action may be brought—
>
> . . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

[3] 29 U.S.C. § 1144(a).

ful discharge claims proceeded at an astounding rate, subjecting employers to previously unrecognized causes of action. At least thirty-nine states now recognize a cause of action for wrongful discharge in violation of "public policy."[4] Thousands of such lawsuits have been filed across the country, resulting in six- and seven-figure awards for compensatory and punitive damages.[5] A similar proliferation of ERISA pension plans has occurred since Congress enacted ERISA, creating an ever larger universe of potential state law wrongful discharge plaintiffs who are about to vest in their pension rights.[6] The aging of the so-called "baby boom" generation, resulting in a greater percentage of individuals at retirement age, will soon put the financial stability of pension plans to its most stringent test.

Our members therefore have an obvious and growing interest in ensuring that the uniform and exclusive federal rules relating to employee pension benefits remains free from state interference, and that congressional decisions regarding the liability of employers in connection with such plans be preserved from contrary state judgments.

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[4] *See* "Employment-At-Will State Rulings Chart," I.E.R.M. (BNA), at 505:51 (1989).

[5] One research firm has determined that the national average damage award in cases based on wrongful termination rose from $227,280 in 1986 to $311,332 in 1987. *See* "See You In Court," Nation's Bus., July 1989, at 17. Columbia University professor Alan F. Westin has estimated that some 25,000 wrongful discharge cases were pending in federal and state courts in 1987. *See* "It's Getting Harder to Pass Out Pink Slips," Bus. Wk., March 28, 1988, at 68.

[6] According to the most recent Department of Labor data, employers in 1987 maintained some 872,000 private pension plans, covering 41.9 million workers. *See* Pension and Welfare Benefits Administration, U.S. Department of Labor, "Trends in Pensions" 13, Table 1.3 (1989).

SUMMARY OF ARGUMENT

1. Exercise of the Court's jurisdiction is necessary to preserve the complex, uniform and comprehensive statutory scheme created in ERISA from state interference. Designed to ensure the soundness and stability of covered employee benefit plans, ERISA establishes uniform national rules to govern comprehensively such plans. One of the most complex and reticulated statutes ever adopted, ERISA broadly regulates employee benefit plans from formation to dissolution by establishing detailed requirements governing, *inter alia*, vesting of benefits, disclosure and reporting of plan financial information, the responsibilities and obligations of plan fiduciaries, standards of funding, rights of participants and employees, and plan termination.

2. Congress, when it created this complex federal code, determined that uniform and exclusive federal regulation of benefit plans was required. Congress codified this decision broadly to preempt all state laws relating to benefit plans in an express preemption provision that serves as a fundamental part of the statutory scheme created in ERISA. The Court repeatedly has recognized, in a line of cases beginning with *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), that Congress deliberately adopted ERISA's broad express preemption provision in order to ensure that an exclusive set of federal rules governs the complex area of employee benefit plans.

3. This broad preemption provision, which voids all state laws "insofar as they may now or hereafter relate to" any covered benefit plan,[7] precludes Texas' effort to supplement federal remedies for a wrong already recognized in the text of ERISA. Not only did Congress make it unlawful under federal law to discharge an employee to avoid payment of pension benefits; Congress chose to provide only equitable relief for such violations, and to in-

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[7] 29 U.S.C. § 1144(a).

sulate such discharge claims from any state interference to the maximum extent possible by vesting exclusive jurisdiction over ERISA discharge claims in the federal courts. The Court repeatedly has preserved the integrity of ERISA's exclusive federal remedial scheme, and specifically has held that state tort claims remediable through compensatory and punitive damages are inconsistent with the detailed federal remedial scheme created in ERISA.

4. It is no answer to say that Texas merely is adding a sanction to conduct already prohibited by federal law. In a line of cases exemplified by *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282 (1986), the Court uniformly has rejected the notion that the states are free to add remedies where Congress has prohibited conduct under federal law and created an exclusive federal statutory remedy. The states are not free to determine that Congress has created insufficient remedies to vindicate federal interests. This is especially true where, as here, the congressional choice of remedy is part of an integrated remedial scheme deliberately designed to balance competing interests of employers and plan participants, and Congress has provided exclusive federal court jurisdiction for enforcement of the federal rights in question.

5. Unless the decision below is reversed, state courts will be free to rely upon federal law as a basis for state "public policy," and thus to create new remedies where Congress already has decided to preclude the states from enforcing these federal interests. While this case presents an extreme example of state interference in an area deliberately and expressly closed to state regulation, there are numerous other fields of federal interest in which Congress has created an uniform code of conduct, complete with exclusive federal statutory remedies. If Texas can act here, in the face of ERISA's express preemption provision, other state courts will feel no constraints when faced with federal statutes that do not expressly preempt state law, but where Congress nonetheless intended to preserve federal uniformity. The dangerous precedent that would be created by allowing state adjudication in the face of ERISA's express preemption provision cannot be overstated and deserves the Court's immediate attention.

ARGUMENT

I. EXERCISE OF THE COURT'S JURISDICTION IS REQUIRED TO ENSURE THE PREEMPTION OF ALL STATE LAWS RELATING TO EMPLOYEE BENEFIT PLANS, AS EXPRESSLY INTENDED BY CONGRESS.

We will not address the decisional conflict created by the decision below and discussed at length by Petitioner. *See* Petition for Writ of Certiorari to the Supreme Court of Texas, at 9-13. While this conflict in itself justifies granting the Petition, in our view there are several additional and equally important reasons for the Court to consider this case on the merits.

First, the Court's immediate attention is necessary to preserve the federal statutory scheme embodied in ERISA from state intrusion. The decision below conflicts with a deliberate, careful and unequivocal congressional choice to preempt state law in this field. The express preemption provision enacted by Congress in Section 514 of ERISA is one of the clearest and broadest preemption provisions contained in federal law. Using unequivocal language, Congress provided that "the provisions of [ERISA] . . . supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by the statute.[8]

The Court repeatedly has emphasized that this language, and the legislative history of ERISA, demonstrate that Congress made a deliberate decision to "establish pension plan regulation as exclusively a federal concern." *Alessi*,

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[8] 29 U.S.C. § 1144(a).

451 U.S., at 523. As the Court explained in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983):

> The bill that became ERISA originally contained a limited pre-emption clause, applicable only to state laws relating to the specific subjects covered by ERISA. The Conference Committee rejected those provisions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language. See H.R. Conf. Rep. No. 93-1280, p. 383 (1974); S. Conf. Rep. No. 93-1090, p. 383 (1974).

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), the Court noted that "the House and Senate sponsors emphasized both the breadth and importance of the pre-emption provisions." Indeed, the Court quoted from one sponsor of the act who characterized the "'reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans' as ERISA's 'crowning achievement.'" *Id.* (quoting 120 Cong. Rec. 29197 (1974)). Petitioner thus asks the Court to enforce a preemption provision that was deliberately included in the explicit language of ERISA because Congress itself deemed it fundamental to the complex statutory scheme being created.

The Court repeatedly has struck down state attempts to infringe on this area of exclusive federal interest, recognizing the "expansive sweep of [ERISA's] preemption clause" and giving it a "broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Pilot Life Ins. Co.*, 481 U.S., at 47 (citations omitted). For example, in *Alessi*, 451 U.S., at 522-25, the Court held that ERISA preempted a New Jersey law prohibiting workers' compensation benefits from being used to offset pension benefits because the state law "relates to" pension plans.[9] Two years later, in

[9] Significantly, the state law preempted in *Alessi* at least served the principal purpose of regulating workers' compensation calculations. The wrongful discharge action recognized by the court below, by contrast, expressly vindicates the federal interest in protecting ERISA benefits, and thus even more closely "relates to" pension benefits than the state law struck down in *Alessi*.

Shaw, 463 U.S., at 96, the Court had "no difficulty in concluding that" ERISA preempted a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy because it "'relate[s]' to employee benefit plans."[10]

These preemption principles have been applied directly to the congressional choice of remedies implicated in this case. In *Pilot Life Ins. Co.*, 481 U.S., at 47-48, the Court held that Section 514 of ERISA preempted three state tort claims—for tortious breach of contract, breach of fiduciary duties and fraud in the inducement—alleging a failure to provide benefits under a long term disability employee benefit insurance plan. In holding that these state causes of action were not saved by the insurance exception to ERISA preemption, the Court explicitly emphasized that ERISA's comprehensive civil enforcement scheme "is one of the essential tools for accomplishing the stated purposes of ERISA" and functions as "the exclusive vehicle" for protecting ERISA rights. 481 U.S., at 52. Leaving no doubt that states could not impose supplemental remedies relating to conduct prohibited by ERISA, the Court stated:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and

[10] The sex discrimination prohibited by the New York law at issue in *Shaw* is not even specifically prohibited by ERISA, which contains no prohibition against sex discrimination in benefit plans. Despite this "hole" in ERISA's regulatory scheme, the Court held that the state law was preempted. In this case the federal-state conflict is even clearer, because ERISA expressly prohibits discharge for the purpose of interfering with pension benefits, provides a defined set of limited remedies, and gives federal courts exclusive jurisdiction over such claims.

> fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. *The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.*

Id. at 54 (emphasis added).[11]

Congress' deliberate decisions to make it unlawful for employers to discharge employees to avoid the payment of pension benefits, and to specify that violations of this section of the statute were to be remedied through equitable as opposed to legal relief, are precisely the choices that the decision below intrudes upon. As the Court observed in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985), an earlier version of ERISA contained authorization for the entry of legal and equitable relief, but this language was eliminated when the act passed. The Court further observed:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress

[11] The importance of maintaining the integrity of ERISA's remedial scheme is illustrated further by the Court's recent decision in *Guidry v. Sheet Metal Workers National Pension Fund*, —— U.S. ——, 110 S. Ct. 680 (1990) (concluding that a constructive trust, imposed on pension benefits as a remedy for a violation of the Landrum-Griffin Act, contravened ERISA's non-alienation clause). While this case concerns employer liability rather than the rights of plan participants, the essential question in both *Guidry* and this case is the same; preservation of the integrity of ERISA's statutory scheme. *See also FMC Corp. v. Holliday, cert. granted*, —— U.S. ——, 58 U.S.L.W. 3526 (U.S. Feb. 20, 1990) (No. 89-1048) (dealing with the scope of the insurance exemption to federal preemption, and reinforcing the Court's interest in the interrelationship between ERISA and state law). Of course, resolution of the narrow issue presented in *FMC Corp.* regarding the so-called "deemer clause" would not resolve the vital issues presented in this case.

> did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L.Ed.2d 354 (1980).

Id. at 147 (emphasis in original).

The ERISA remedial scheme is part and parcel of a delicate balance between the interests of employers, labor organizations and plan participants, undertaken with full knowledge that imposition of excessive costs upon employers would discourage the formation of new retirement plans. *See Massachusetts Mutual Life Ins. Co.*, 473 U.S., at 148 n.17, and legislative history there cited. As Senator Nelson stated during floor debate on the Conference Report on the bill that eventually was enacted:

> [Costs are] an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, . . . Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15,762 (daily ed. Aug. 22, 1974). *See also Pilot Life Ins. Co.*, 481 U.S., at 52 (ERISA's "comprehensive civil enforcement scheme . . . represents a careful balancing of the need for prompt and fair claims settlement procedure against the public interest in encouraging the formation of employee benefit plans").

In our view, as in *Pilot Life*, exercise of the Court's jurisdiction and reversal of the decision below therefore is necessary to preserve the balance struck by Congress and to protect "the clear expression of congressional in-

tent that ERISA's civil enforcement scheme be exclusive." *Id.* at 57.

Indeed, preemption in this case does not rest solely upon a congressional choice of an equitable remedy; Congress additionally vested exclusive jurisdiction over ERISA discharge claims in the federal courts.[12] Congress' creation of exclusive federal jurisdiction is unusual in our federal system, where state and federal courts generally share concurrent jurisdiction over federal claims. It is only where concurrent state jurisdiction is "excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case" that the courts will find exclusive federal jurisdiction. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 508 (1962); *see also Tafflin v. Levitt*, —— U.S. ——, 110 S. Ct. 792 (1990)

Congress' unusual choice of an exclusive federal forum, as part of an enforcement scheme that insulates ERISA-related discharge claims from any substantive state interference, would be rendered a nullity if the decision below is allowed to stand. Any plaintiff could evade Congress' explicit choice of an exclusive federal forum (and its decision to allow only equitable relief) merely by labeling his or her discharge claim as a violation of state "public policy."[13] A state court that would not even have jurisdiction over the same claim, based upon exactly the same facts and exactly the same federal policy if pleaded under ERISA, would be empowered by artful pleading to award compensatory and punitive damages far in excess of the relief contemplated by Congress when it created ERISA. We believe the Court should entertain this matter on the merits in order to

[12] *See supra*, note 2.

[13] As described by the English courts more than 150 years ago, public policy "is a very unruly horse, and . . . once you get astride it you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (1824).

avoid this anomalous result and protect Congress' explicit choice of exclusive federal enforcement of ERISA claims.

II. THE DECISION BELOW CONSTITUTES A DANGEROUS PRECEDENT FOR AVOIDING PREEMPTION AND DESTROYING THE SUPREMACY OF FEDERAL LAW.

According to the decision rendered by the Supreme Court of Texas, ERISA's express preemption provision does not preclude a wrongful discharge claim alleging interference with pension benefits because the respondent "is *not* seeking lost *pension benefits* but is instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge." *McClendon v. Ingersoll-Rand Company*, —— Tex. ——, 779 S.W.2d 69, 71 n.3 (1989) (emphasis in original).[14] This "supplemental remedies" theory for avoiding federal preemption may be restated as follows: because the state provides more expansive remedies in order to vindicate federal interests, there is no federal-state conflict and federal preemption does not apply. This reasoning assumes that the same Congress that was far-sighted enough to create the important federal law in question was incompetent to ensure adequate protection of the federal rights it created, and that state judgments as to appropriate remedies should be substituted for congressional decisions as to how

[14] Congress created only two generic exceptions to the broad reach of ERISA preemption, neither of which is applicable to this case. First, Congress provided that the express preemption provision should not "be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). Second, the preemption provision does not apply "to any generally applicable criminal law of a State." 29 U.S.C. § 1144(b)(4). Significantly, Congress created neither a general exception allowing states to protect pension rights nor a specific exception allowing them to prohibit discharges intended to interfere with the attainment of such rights.

federal interests should be protected.[15] The Court never has embraced such an illogical assumption. In fact, well-established precedent of the Court establishes that a deliberate congressional choice of an exclusive federal remedy cannot be supplanted by the states.

The Court most recently held that states may not provide supplemental state remedies for conduct prohibited by a preemptive federal regulatory scheme in *Wisconsin Dept. of Industry v. Gould Inc.*, 475 U.S. 282, 286-87 (1986). In *Gould*, the state of Wisconsin prohibited state procurement officials from purchasing any product from a firm or person found to have violated the National Labor Relations Act ("NLRA") in three separate cases within the preceding five years. The Court in *Gould* rejected precisely the theory espoused by the court below; that the state statute was not preempted because it merely provided supplemental penalties for violations of federal law. The Court reasoned that " 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' " *id.* at 286 (quoting *Garner v. Teamsters*, 346 U.S. 485, 498-99 (1953)), and that the Wisconsin statute would interfere with Congress' " 'integrated scheme of regulation' by adding a remedy to those prescribed by the NLRA," *id.* at 287 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). The Court expressly rejected Wisconsin's argument that its "supplemental remedy" was "different in kind from those that may be ordered by the Board" because " 'to allow the State to grant a remedy . . . which

[15] The manifest disregard for deliberate federal judgments revealed by the decision below is perhaps best appreciated by considering the constitutionality of a state law authorizing state courts to entertain ERISA discharge suits, and to award compensatory and punitive damages, expressly premised on the state's conclusion that Congress had not gone far enough in protecting the rights of employees when it enacted ERISA. The unconstitutionality of such a law is manifest, and there is no meaningful distinction between the decision below and such a statute.

has been withheld from the National Labor Relations Board only accentuates the danger of conflict.' " *Id.* (quoting *Garmon*, 359 U.S., at 247).[16]

The potential disruption likely to arise from application of the "supplemental remedies" theory in cases such as this cannot be overstated.[17] The integrity of numerous federal regulatory schemes that Congress intended to have preemptive force would be destroyed if states are allowed to supplement federal remedies, despite congressional determinations concerning appropriate remedies and enforcement mechanisms.

[16] In *Garmon*, the Court held that a state could not provide tort damages for picketing prohibited by the NLRA. The Court rejected the argument that preemption did not apply because California was attempting to provide a different remedy, damages, in addition to the injunction that the Board can obtain. The Court squarely stated:

> Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme . . . .

Garmon, 359 U.S., at 247. The NLRA does not contain any express preemption language. The principle enunciated in *Gould* and *Garmon* is even more appropriate where, as here, it rests upon a preemption clause phrased in the broadest and most expansive language.

[17] The issue involved in *English v. General Electric Co., cert. granted*, —— U.S. ——, 110 S. Ct. 862 (Jan. 22, 1990) (No. 89-152) —whether the whistleblower protection contained in Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, preempts state tort claims for wrongful discharge and intentional infliction of emotional distress—does not address directly the right of a state court to rely upon federal law as a basis for state public policy, nor does it involve a deliberate congressional choice of remedies insofar as compensatory damages are available for a violation of federal law in that case. *See, e.g., English v. Whitfield*, 858 F.2d 957 (4th Cir. 1988) (federal claim for retaliatory harassment, arising from same incident as state tort suit, remanded to Secretary of Labor for reconsideration; compensatory damages held available in federal proceeding). The ability of a state to rely upon federal law as a basis for state public policy, and thus to add remedies to an inte-

Congress is wholly competent not only to create federal rights, but to provide an exclusive statutory scheme for their vindication. When it has done so expressly, as it has in ERISA, state courts have no business deciding, under a "public policy" rubric, that Congress has not gone far enough in protecting federal interests. The decision below constitutes such a fundamental threat to the principle of federal supremacy that the Court should step in, as it historically has done, to protect the deliberate decisions of Congress from state interdiction.

III. ALLOWING TORT CLAIMS FOR WRONGFUL DISCHARGE IN VIOLATION OF THE PUBLIC POLICY PROTECTING PENSION RIGHTS POSES AN ESPECIALLY SIGNIFICANT THREAT TO THE UNIFORM REGULATION OF PENSION PLANS, NECESSITATING THE COURT'S IMMEDIATE ATTENTION.

In the days when states across the country uniformly applied the employment at will doctrine, the decision of the Supreme Court of Texas could be viewed as an isolated anomaly that did not pose a significant nationwide threat to the uniform pension regulation established by ERISA. The past decade, however, has seen the steady erosion of the employment at will doctrine and an explosion in the number of claims alleging wrongful discharge in violation of public policy. As matters now stand, at least thirty-nine states recognize a cause of action for wrongful discharge in violation of public policy.[18] Thousands of such claims have been filed across the country, seeking millions of dollars in compensatory and punitive damages. Large

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grated federal remedial scheme that Congress deliberately intended to serve as the exclusive avenue for obtaining relief need not be resolved in *English, cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (Atomic Energy Act does not preempt state tort suit), and is an issue of sufficient moment, for the reasons explained above, to justify the Court's immediate attention.

[18] *See supra*, note 4.

awards in wrongful discharge cases have become commonplace.[19] By one estimate, average awards in successful California wrongful discharge actions run as high as $486,812.[20] Juries have awarded as much as $20 million to single individuals in wrongful discharge cases.[21]

Against this backdrop of the staggering increase in tort liability for wrongful discharge, the decision below poses an especially significant threat to the limited equitable remedies and exclusively federal remedial scheme created by Congress in ERISA. If the decision below is left undisturbed, thousands of employers who decided to create ERISA covered pension plans in reliance on ERISA's exclusive regulatory scheme will find themselves subject to vastly increased liabilities for compensatory and punitive damages unanticipated when they decided to maintain such plans. The careful balance that Congress struck in defining ERISA liabilities would be fundamentally altered on into the future as well, as employers would face the uncertain prospects of new state-imposed liabilities for maintaining federally controlled pension plans.

Compounding these problems, the number of individuals who are about to vest in their pension rights is ever increasing. Thousands of private pension plans have been created, and more and more employees vest in their rights each year.[22] Significantly, our population will soon

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[19] *See supra*, note 5.

[20] Jung & Harkness, "The Facts of Wrongful Discharge," 4 Lab. Law. 257 (1988). Other estimates are even higher. An article appearing in the Los Angeles Times on July 31, 1988, stated that jury awards in successful wrongful discharge cases in California stood at $1,469,327 in 1987. Bradsher, "Firms Ask that Workers Waive Job Security," L.A. Times, July 31, 1988, § 1, at 1, col. 2.

[21] Lopatka and Martin, "Developments in the Law of Wrongful Discharge," ABA National Institute, Litigating Wrongful Discharge and Invasion of Privacy Claims, 13-14 (1986).

[22] *See supra*, note 6.

undergo a demographic shift, causing an inevitable increase in the number of individuals at retirement age. As a result, at the same time that pension plans are being put to their most stringent financial tests, thousands of employees who are about to vest in their pension rights will be able to bring tort claims for wrongful discharge seeking extensive compensatory and punitive damages under the decision below. In these circumstances, we believe that an especially compelling basis is presented for exercise of the Court's jurisdiction.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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